



BRB No. 17-0062

MICHAEL BEVERLY

Claimant

v.

VIRGINIA INTERNATIONAL
TERMINALS, LLC

and

SIGNAL MUTUAL INDEMNITY
ASSOCIATION, LIMITED

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Respondent

DATE ISSUED: Nov. 27, 2017

DECISION and ORDER

Appeal of the Decision and Order - Approving Stipulations and Denying
Section 8(f) Entitlement of Paul C. Johnson, Jr., Administrative Law Judge,
United States Department of Labor.

R. John Barrett (Vandeventer Black LLP), Norfolk, Virginia, for
employer/carrier.

Ann Marie Scarpino (Nicholas C. Geale, Acting Solicitor of Labor; Maia
Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer appeals the Decision and Order - Approving Stipulations and Denying Section 8(f) Entitlement (2016-LHC-00201, 2016-LHC-00202) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant started working for employer in 1995. In July 2001, claimant was unlocking containers on a train when someone started moving the train, causing him to fall on his left shoulder and to tear his rotator cuff. EX 1 at 7-8. He continued working while awaiting surgery. After the surgery, his primary physician, Dr. Sidney Loxley, assigned a 25 percent disability rating for his left upper extremity. *Id.* at 8-9.

After the shoulder injury, claimant was assigned permanent work restrictions and told he could no longer work on the landbridge. EX 1 at 9. Since that time, he worked strictly as a hustler driver, a job which entailed driving big trucks and trailers around the terminal. *Id.* at 10. He continued to experience problems with his shoulder, as well as bilateral carpal tunnel syndrome.

Claimant saw Dr. Arthur Wardell for the first time in August 2004 complaining of pain in his shoulders. EX 2 at 6. He was diagnosed as having a rotator cuff tear in his right shoulder. *Id.* Dr. Wardell recommended surgery which claimant decided to postpone so he could continue to work. *Id.* at 6-7.

On August 1, 2011, claimant fell off the mezzanine, suffering a lumbosacral spine sprain, a right buttock contusion, and a medial meniscus tear of his right knee. EX 2 at 4-5. Claimant was treated for these injuries by Dr. Wardell, undergoing an arthroscopic partial medial meniscectomy of his right knee in March 2012. Dr. Wardell also performed carpal tunnel surgeries on claimant's left wrist in August 2011 and his right wrist in October 2011. *Id.* at 10-11. Claimant underwent surgery to repair a torn rotator cuff in his right shoulder in November 2013. *Id.* at 10. Claimant has not worked since his 2011 injury. EX 1 at 16.

The right knee surgery resulted in a 4 percent impairment of claimant's lower extremity. EX 2 at 12. Dr. Wardell testified that he would assign an impairment rating of between 10 and 15 percent of the upper extremity for the right shoulder injury. *Id.* Dr. Wardell testified that claimant's carpal tunnel syndrome was exacerbated by his job-related activities, which were also worsening his rotator cuff tear. *Id.* at 8. He stated that if claimant had only the August 1, 2011 knee injury, he would still be able to work after the knee surgery, provided the jobs did not require repetitive squatting and climbing

ladders. *Id.* at 13-14. His permanent total disability is a result of the combination of all his injuries. *Id.*

Claimant filed a claim for compensation for his bilateral shoulder injury and carpal tunnel syndrome on August 1, 2011 and another claim on August 9, 2011 for his August 1, 2011 right knee and hip injuries. Claimant and employer stipulated that claimant is permanently totally disabled; the administrative law judge accepted this stipulation and awarded benefits accordingly. Decision and Order at 2-3. Employer filed a claim for Section 8(f) relief, contending claimant had manifest pre-existing permanent partial disabilities because of his carpal tunnel syndrome and his shoulder injuries that combined with the August 1, 2011 knee injury to render claimant permanently totally disabled. Because the Director, Office of Workers' Compensation Programs (the Director), did not join the private parties' stipulations, the administrative law judge addressed the nature and extent of claimant's disabilities. The administrative law judge found that claimant's disability became permanent on June 24, 2014 and that claimant's credible complaints of pain and Dr. Wardell's medical opinion establish that claimant cannot return to his usual employment. The administrative law judge further found that employer did not identify any suitable alternate employment. Therefore, the administrative law judge concluded that claimant is permanently totally disabled and he awarded claimant temporary total disability benefits from August 2, 2011 to June 24, 2014 and ongoing permanent total disability benefits from June 25, 2014. *Id.* at 12-13.

With respect to employer's claim for Section 8(f) relief, the administrative law judge rejected employer's contention that the Director conceded the pre-existing, permanent partial disability element with regard to claimant's carpal tunnel syndrome and right shoulder injury. The administrative law judge found that the evidence does not support a conclusion that claimant's right shoulder injury and bilateral carpal tunnel syndrome were "pre-existing disabilities," but that only claimant's left shoulder impairment constitutes a manifest, pre-existing permanent partial disability. The administrative law judge found that claimant's right knee, right shoulder, and bilateral carpal tunnel syndrome were the subsequent work-related injuries, and that employer did not establish that claimant's permanent total disability is not due solely to these injuries. Decision and Order at 15. Accordingly, the administrative law judge denied employer's claim for Section 8(f) relief.

Employer appeals the administrative law judge's denial of Section 8(f) relief. The Director filed a response brief, urging affirmance of the administrative law judge's decision.

In order for an employer to qualify for relief under Section 8(f) in a case where the claimant is permanently totally disabled, an employer must establish: (1) that the claimant had an existing permanent partial disability; (2) that the pre-existing partial

disability was manifest to the employer; and (3) that the claimant's permanent total disability is "not due solely" to the subsequent work-related injury but was contributed to by the pre-existing disability. 33 U.S.C. §908(f)(1); *see, e.g., Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *see also Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007). The Board has stated that the third element essentially requires that an employer must show that a claimant's total disability is due to both the subsequent work injury and the pre-existing disability. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). For the reasons that follow, we agree with employer that the administrative law judge's denial of Section 8(f) relief cannot be affirmed.

A. The Pre-Existing Permanent Partial Disability Element

On appeal, employer challenges the administrative law judge's conclusion that claimant's right shoulder injury and bilateral carpal tunnel syndrome were not pre-existing permanent partial disabilities. Employer specifically contends that the Director, in his brief before the administrative law judge, conceded that the right shoulder injury and bilateral carpal tunnel syndrome were pre-existing disabilities.¹

The administrative law judge found that the Director did not concede that claimant's right shoulder injury and carpal tunnel syndrome were pre-existing permanent partial disabilities. Decision and Order at 14. The administrative law judge noted that the Director conceded only that claimant had "pre-existing bilateral carpal tunnel and shoulder *injuries*" but not that these injuries were "disabling" for purposes of Section 8(f). *Id.* at 13 (emphasis in original) (quoting Dir. Brief in Opp. at 5). In this respect, the administrative law judge accurately stated that the mere fact of an injury does not establish "disability" for purposes of Section 8(f). *See Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003).

¹ In his brief before the administrative law judge, the Director made a plain distinction between the fact of injury and the condition of disability. Initially, he explained that for a medical condition to qualify as a disability it must be "of such gravity" that it amounts to "a serious lasting physical problem." Dir. Brief in Opp. at 5 (citation omitted). Quoting the United States Court of Appeals for the Fourth Circuit, the Director then stated, "the mere fact of past injury does not itself establish disability[;]" rather, there "must exist, as a result of that injury, some serious, lasting physical problem." In the following sentence, he conceded "that the Claimant has pre-existing bilateral carpal tunnel and shoulder *injuries* identified in the application for 8(f) relief." *Id.* (emphasis added).

We are satisfied that the administrative law judge acted within his discretion to find that the Director did not concede the existence of pre-existing permanent partial disabilities. *See generally Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 436, 3 BRBS 398, 400 (5th Cir. 1976) (administrative law judge charged with “selecting the inference which seems most reasonable”). The administrative law judge rationally concluded that “Employer’s contention [that the Director conceded the existence of pre-existing permanent partial disabilities] overstates the Director’s concession” and “conflates the Director’s use of the terms injury and disability.” Decision and Order at 13. The administrative law judge’s conclusion is adequately explained, consistent with the law, and constitutes a permissible reading of the pleadings. Indeed, the argument that the Director conceded pre-existing “disabilities” is belied by the plain language of the Director’s brief, wherein he conceded pre-existing “injuries.”² Dir. Brief in Opp. at 5.

The administrative law judge further found that the evidence does not support a finding that claimant’s right shoulder condition and bilateral carpal tunnel syndrome were, in fact, disabilities. The administrative law judge noted that claimant’s earning capacity was not affected by these conditions as he continued to work as a hustler driver until he injured his right knee in August 2011. Decision and Order at 14. Accordingly, the administrative law judge concluded that claimant’s right shoulder injury and bilateral carpal tunnel syndrome were not pre-existing partial disabilities for purposes of Section 8(f) relief. *Id.*

We conclude that the administrative law judge failed to apply the correct legal standard in determining that claimant’s right shoulder injury and bilateral carpal tunnel syndrome were not pre-existing partial disabilities. Therefore, we cannot affirm his finding in that regard. While the administrative law judge correctly noted that the existence of an injury alone does not establish the pre-existing permanent partial disability element, *Cherry*, 326 F.3d at 453, 37 BRBS at 9(CRT), the administrative law judge did not address the fact that the test for the existence of a pre-existing partial disability is whether claimant had “some serious, lasting physical problem” such that a cautious employer would have been motivated to discharge the employee because of an increased risk of liability. *See Beumer v. Navy Personnel Command*, 39 BRBS 98 (2005); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988). It is well established that a condition need not be economically disabling to be a pre-existing permanent partial disability for the purposes of Section 8(f) relief. *See Lawson v. Suwanee Fruit &*

² Moreover, when read in context, the notion that the Director would draw a careful distinction between injury and disability only to immediately concede disability defies logic.

Steamship Co., 336 U.S. 198 (1949); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Devor v. Dep't of the Army*, 41 BRBS 77 (2008).

Dr. Wardell's medical reports state that claimant's carpal tunnel syndrome and his right shoulder were symptomatic before the 2011 injuries. Dr. Wardell recommended right shoulder surgery for a rotator cuff tear in 2004, which claimant decided to defer. EXs 2 at 6; 13. In 2003 and 2006, claimant was diagnosed with moderate to severe carpal tunnel syndrome in his right and left hands. EXs 8 at 8; 14 at 3. The fact that claimant was not economically disabled by these conditions or assigned an impairment rating is not dispositive, as the conditions nonetheless can be a serious, lasting physical condition for the purposes of Section 8(f). *Smith*, 22 BRBS at 3; *Devor*, 41 BRBS at 81; *see also Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990) (an asymptomatic condition may constitute a pre-existing permanent partial disability for purposes of Section 8(f)). The administrative law judge did not address the medical evidence in light of the relevant case law and, accordingly, we must vacate his finding that employer did not satisfy the pre-existing permanent partial disability element. We remand the case for the administrative law judge to address whether claimant's carpal tunnel syndrome and/or right shoulder injury was a serious, lasting physical problem under the "cautious employer" test. *See Beumer*, 39 BRBS at 103.

B. The Contribution Element

Employer also contends that the subsequent work-related injury at issue is only claimant's right knee injury, as the last-occurring injury. Employer contends, therefore, that the issue is whether it has established that claimant's total disability is not due solely to the right knee injury and that it has met its burden of so showing.³

In order to establish entitlement to Section 8(f) relief in cases involving permanent total disability, employer must show that a claimant's subsequent injury alone would not have caused his permanent total disability. *See Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). "[T]he existence of multiple injuries that combine to increase a claimant's disability will satisfy the contribution requirement when the pre-existing injuries are necessary to push the claimant 'over the hump' from

³ Dr. Wardell stated that if claimant had only the August 1, 2011 knee injury, he would have been able to work after the knee surgery, provided the jobs did not require repetitive squatting and climbing ladders. EX 2 at 13-14. He stated claimant's permanent total disability is a result of the combination of all his injuries. *Id.*

partial to total disability.” *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

The administrative law judge stated that the inquiry concerning the contribution element is not merely on the last-occurring injury but whether the claimant’s total disability is not due solely to the injury which is the subject of the claim. In this case, the administrative law judge stated that the “subject of the claim” includes the right shoulder injury and bilateral carpal tunnel syndrome, as well as the knee injury. Decision and Order at 15. Finding that claimant would not be totally disabled but for these three injuries, the administrative law judge denied the claim for Section 8(f) relief. *See id.*

We cannot affirm the administrative law judge’s finding that claimant’s right shoulder injury and bilateral carpal tunnel syndrome should be viewed in conjunction with the knee injury as the “subsequent injury.” First, we note that the knee injury was unquestionably the last in chronological time. The administrative law judge also did not consider the significance, if any, of claimant’s separate claims for benefits and the fact that claimant indicated different dates of injury for his right shoulder and carpal tunnel syndrome than for his knee injury. Employer’s LS-202, employer’s first report of injury, referring to claimant’s claim for injuries to his right shoulder and carpal tunnel syndrome, gave the date of injury as July 6, 2011. *See* EX 16 at 1; *see also* Dir. Brief in Opp. at 1,4, 5 (referring to claimant’s injuries of July 6 and August 1, 2011). Claimant testified that he made that claim after he “was coming out of the strad and [he] fell.” EX 1 at 12. Claimant continued working until he suffered the right knee injury on August 1, 2011, whereupon he filed another claim on August 9, 2011. *See* EX 16 at 2 (Employer’s first report of injury for right knee injury).

It would be possible to conclude from the evidence that claimant’s right knee injury alone is the subsequent injury because it occurred in a separate work incident that had no connection to the work incident giving rise to the claim for the right shoulder injury and carpal tunnel syndrome. *See Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), *rev’g Cooper v. Cooper Associates*, 7 BRBS 853 (1978) (reversing the Board’s holding because every day claimant went to work did not constitute a discrete, identifiable injury). A prior work-related injury can constitute the pre-existing disability for purposes of Section 8(f). *See DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT); *Cutietta v. Nat’l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015). The facts that claimant filed a claim for his right shoulder injury and carpal tunnel syndrome so closely in time to the right knee claim and that the claims were adjudicated together are not dispositive of whether those injuries together constitute the “subsequent injury” as opposed to separate injuries.⁴ *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219

⁴ Similarly, the fact that claimant pursued medical treatment for his carpal tunnel syndrome and right shoulder condition after he became disabled by the knee injury does

(1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992) (the Board reversed the administrative law judge's determination that claimant only suffered one injury because claimant's injuries occurred within a short span of time and were closely related to each other); *see also Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). We, therefore, vacate the administrative law judge's finding that the carpal tunnel syndrome, right shoulder injury and knee injury all comprise the "subsequent injury" and we remand the case for the administrative law judge to address the evidence relevant to this issue pursuant to applicable law. On remand, the administrative law judge should address the contribution element consistent with his findings regarding the "subsequent injury." *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Accordingly, we vacate the administrative law judge's denial of Section 8(f) relief, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' opinion that the administrative law judge acted within his discretion in determining that the Director did not concede the satisfaction of the pre-existing, permanent partial disability element on the basis of claimant's bilateral carpal tunnel syndrome and shoulder injuries. The Director's brief before the administrative law judge stated, "[T]he evidence in this case establishes that the Claimant has pre-existing permanent partial *disabilities* that were manifest . . . but

not establish that all the injuries comprise the same claim or that the injuries occurred at the same time.

there is no evidence . . . that these pre-existing *disabilities* contributed in any way to permanent total disability” Dir. Brief in Opp. at 4 (emphasis supplied). Under the heading “Pre-existing permanent partial *disability*,” (emphasis supplied), the Director’s brief below states, “The Director concedes that the Claimant has pre-existing bilateral carpal tunnel and shoulder injuries identified in the application for 8(f) relief.” *Id.* at 6. Under the heading “Manifest,” the Director set forth the legal standard and stated, “A *disability* is considered manifest if an employer has actual knowledge of the pre-existing *disability* or if there is a medical record in existence making the *disability* objectively determinable” (emphasis supplied) immediately before making his concession that the manifest element was satisfied. *Id.* In his contribution argument below, the Director questioned the evidence that claimant is permanently totally disabled. The Director averred that employer “failed to establish the contribution element of its claim for section 8(f) relief” *Id.* at 8.

In light of these statements and the structure of the Director’s arguments, the basis for the administrative law judge’s determination that the Director was merely conceding that claimant had pre-existing *injuries* is not obvious.⁵ Consequently, the administrative law judge was required to explain his conclusion that the Director did not concede the existence of pre-existing permanent partial disabilities in the form of bilateral carpal tunnel syndrome and injuries to both shoulders. The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), requires the administrative law judge to make “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or *discretion* presented on the record.” (emphasis supplied). Absent such an explanation on this issue, the administrative law judge’s determination cannot be affirmed. Therefore, I would remand for the administrative law judge to further address this issue. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 384, 28 BRBS 96, 106(CRT) (4th Cir. 1994).

With the exception of this issue, I concur with my colleagues’ decision.

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ There is no argument in the Director’s brief below that makes the distinction found by the administrative law judge, nor is there argument that the pre-existing permanent partial disability element is not satisfied.